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IN THE

Supreme Court of the United States

October Term, 1949.

No. 69.

UNITED STATES OF AMERICA

v.

JESSE MILLER SINCLAIR,

Petitioner.

On Writ of Certiorari to United States Court of Appeals for the Third Circuit.

Brief for Petitioner.

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ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion in the Court of Appeals for the Third Circuit (R. 19) is reported in 174 F. 2d 933. There was no opinion in the District Court for the Eastern District of Pennsylvania.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered May 5, 1949 (R. 16). It affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania. The Petition for a writ of certiorari was filed May 12, 1949, and granted on June 21, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Whether a confidential communication between husband and wife can be the basis for the prosecution and conviction of the communicating spouse for violation of Section 211 of the Criminal Code, 18 U. S. C. (1946 ed.) 334.

2. Whether a letter from a husband to his wife disclaiming responsibility for her illness and charging it to her sexual misconduct with other men is "obscene, lewd or lascivious" within the meaning of 18 U. S. C. (1946 ed.) 334.

3. Whether the application of the statute making it a criminal offense for a husband to mail such a sealed letter to his wife is a violation of Petitioner's right of freedom of speech guaranteed by the First Amendment.

STATUTE INVOLVED.

Section 211 of the Criminal Code, 18 U. S. C. [1946 ed.] 334 provided in pertinent part as of the date of the offense involved in this case:

> Every obscene, lewd or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *

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STATEMENT OF FACTS.

Petitioner was indicted on September 8, 1948, charged with knowingly depositing for mailing an obscene, lewd and lascivious letter dated July 14, 1948 (R. 2). The letter was sent to petitioner's wife (R. 3), who was living with her mother because petitioner and his wife had no home (R. 5) but he was coming there weekends (R. 6). It was turned over to the postal inspector by petitioner's wife and she initialed a complaint against him (R. 7). Petitioner waived a jury trial (R. 1), and did not offer any evidence on his behalf but relied solely on a motion for judgment of acquittal (R. 12). He was found guilty of the offense of depositing in the United States mails an obscene letter and was sentenced to imprisonment for a period of one year and a day (R. 14). The Court of Appeals affirmed the judgment in a *per curiam* opinion (R. 15). Petition for certiorari was filed on May 12, 1949, and certiorari was granted on June 27, 1949 (R. 19).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Third Circuit erred:

1. In failing and refusing to hold that the letter between husband and wife was a confidential communication and therefore privileged.

2. In failing and refusing to hold that the letter from the husband to his wife was not "obscene, lewd, or lascivious" within the meaning of 18 U. S. C. (1946 ed.) 334.

3. In failing and refusing to hold that the statute as applied in this particular case violated Petitioner's right of freedom of speech guaranteed by the First Amendment.

SUMMARY OF ARGUMENT.

1. The Petitioner's letter to his wife was a privileged confidential communication and could not be the basis for a prosecution for violation of 18 U. S. C. 334.

2. The Petitioner's letter to his wife was not an "obscene, lewd or lascivious" letter.

3. The application of the statute in the circumstances of this case violated Petitioner's right of free speech under the First Amendment to the Constitution.

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ARGUMENT.

I.

Petitioner's Letter to His Wife Was a Confidential Communication and Hence Absolutely Privileged.

There can be no doubt of its purely personal, confidential character; there is therefore no need to rely upon the presumption that all marital communications are confidential. 8 *Wigmore on Evidence* (3d Ed.) pp. 640-641.

The expression in the letter "Have you told your wife how many men . . ." does not mean that the wife is to show this letter to her family. It asked petitioner's wife a question, and is obviously an attempt by a husband to shift the responsibility for his wife's illness. It is not a direction either express or implied, to reveal the contents of the letter itself. Merely because a husband writes to his wife reproaching her for misconduct does not detract from the confidential character of the communication nor deprive it of the privilege which protects against its disclosure without the sender's consent. *Lanham v. Lanham,* 105 Texas 91, 145 S. W. 336.

In *Wolfle v. United States,* 291 U. S. 7, 78 L. ed. 617, 54 S. Ct. 279, a case involving the use of the mails to defraud, in which a husband dictated a letter to his stenographer and, after transcription, sent it to the wife, this Court stated:

> "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."

In the instant case the communicating spouse made no voluntary disclosure of the letter to a third person. Hence, it remains privileged.

None of the exceptions recognized by the law where the husband is indicted for a crime against his wife are here applicable. In this case, petitioner is charged with violating the postal laws. He was neither indicted nor tried for committing a crime against his wife.

Consequently, the letter was privileged and could not be the basis for either a prosecution or conviction of petitioner.

The test for the exclusion of a confidential communication is not the actual state of marital harmony between the petitioner and his wife at the time of the trial. "The privilege is intended to secure such a guarantee against apprehension of disclosure as will induce absolute freedom of communication." *8 Wigmore* 3d Ed. 2341. This is the underlying reason why the subsequent death of one of the spouses or even divorce does not terminate the privilege.

The Solicitor General in his brief opposing the petition for certiorari suggested that the privilege was waived, relying on the statement made by petitioner's counsel, "I do not believe I can make any objection to that" (R. 9). However, restored to context, the record discloses that this statement had reference only to the question of whether petitioner had written and mailed the letter, which was the one that he had initialed (R. 11). There was no waiver of the right to raise the question of the privileged quality of the letter. The error in basing conviction on this privileged communication was clearly brought to the attention of the trial judge before he found petitioner guilty. When trial counsel argued in support of his motion for judgment of acquittal (R. 12), he contended that the letter was a

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confidential communication and could not be used as evidence to convict petitioner. The argument in support of the motion for judgment of acquittal was not reported stenographically and therefore does not appear in the record. The record does show that counsel for the Government replied to the argument (R. 12). The same Government counsel filed a brief in the Court of Appeals and supported it with oral argument. At no time did he suggest either in his brief or in the oral argument that petitioner's right to raise the question of privilege was barred by the asserted waiver. It is submitted that particularly since this was a trial before the court without a jury, there was no waiver, expressed or implied, of petitioner's fundamental right. *Cf. Glasser v. United States,* 315 U. S. 69. See also Rule 52 (b) of Federal Rules of Criminal Procedure: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

II.

The Letter Written to Petitioner's Wife Is Not Obscene, Lewd or Lascivious Within the Meaning of 18 U. S. C. A. Section 1461.

In *Swearingen v. U. S.,* 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765, this Court held that by "obscene, lewd or lascivious" Congress meant to convey only one thought. This Court stated:

> "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter *to corrupt the morals of the people.* The words 'obscene', 'lewd' and 'lascivious', as used in the statute, signify that form of immorality which has relation to sexual impurity,

and have the same meaning as is given them at common law in prosecutions for obscene libel. *As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.* Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, *calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.*" (Emphasis supplied.)

In the *Swearingen* case the asserted non-mailable matter was a newspaper article which described a certain person as a "red headed mental and physical bastard that flings filth under another man's name" and as one who would sell his mother's honor and "pimp and fatten on his sister's shame with as much unction as a buzzard gluts in carrion", as one who was known as the companion of strumpets, who had "reveled in lowest debauches," and otherwise called the person a coward, liar, pimp, poltroon, and one who could be easily bought.

This Court held the above language not "obscene, lewd or lascivious" within the meaning of the Act. It should be noted that *an obscene libel at common law involved publication.* In this case there is simply a private communication between husband and wife.

By the Act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, 1129, 18 U. S. C. A. Section 334, the words "and every filthy" were added to the Act. The legislative history of this amendment reveals that *another and new class of nonmailable matter was intended by the use of this phrase.* (See 43 Cong. Record, part 1, p. 284):

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"Mr. Moon of Pennsylvania. Mr. Chairman, one word on behalf of the committee. I have no doubt Congress originally intended to create two distinct classes of nonmailable matter by the existing section. Indeed, the decision of the circuit court prior to the time of the Swearingen case had defined the word 'obscene,' or 'obscenity,' as that form of indecency which is calculated to promote the general corruption of morals. They had defined lewdness and lasciviousness as that form of immorality which has respect to sexual impurity. However, that distinct classification was overturned by the Supreme Court decision in the Swearingen case, which decided that owing to the juxtaposition of the words 'obscene,' 'lewd,' and 'lascivious' Congress had created but one class. Therefore feeling that Congress originally intended to create these two distinct classes of prohibition, on behalf of the committee I am entirely willing to put this language in the form offered by the gentleman from Tennessee (Mr. Houston), *which I think does create another class and a class that the department informs us it is very necessary should be excluded from the mails.*" (Emphasis supplied.)

In *U. S. v. Limehouse*, 285 U. S. 424, 426, 52 S. Ct. 412, 76 L. ed. 843, the defendant was charged with the unlawful deposit of "a certain filthy letter and writing." Interpreting the Act, Justice Brandeis stated:

> "The letters contain much foul language; charged the addressees or persons associated with them with sexual immorality, and in some cases charged miscegenation and similar practices. They were coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term. On the ground that no letter was obscene, lewd or lascivious within the meaning given to those terms in Swearingen v. U. S., 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765, the District

Court sustained a demurrer and quashed the indictment. . . . In Swearingen v. United States, decided in 1896, the indictment was under Revised Statutes, Section 3893, U. S. C. Title 18, Section 334, which made unmailable only 'obscene, lewd or lascivious' matter. This Court, being of opinion that those words should be given the meaning attributed to them at common law in prosecutions for criminal libel, directed that the judgment of conviction be reversed, because the language used was not 'calculated to corrupt and debauch the mind and morals of those into whose hands it might fall' and induce sexual immorality. 161 U. S. at 451, 40 L. ed. 766, 16 S. Ct. 562. The indictment here under review contains no reference to 'obscene, lewd or lascivious'. The charge is of depositing 'a certain filthy letter'. It is brought under the amendment to Section 3893 of the Revised Statutes made by Section 211 of the Criminal Code, Act of March 4, 1909, Chap. 321, 35 Stat. at L. 1088, 1129, U. S. C. Title 18, Section 334, which inserted the words 'and every filthy'. Now the clause reads 'every obscene, lewd or lascivious, and every filthy book, . . . letter.'

'The Lower Court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it treated the amended clause as if it had read 'obscene, lewd, lascivious, or filthy'; and then, applying the doctrine of noscitur a sociis, gave to 'filthy' the meaning attributed in the Swearingen case to the words 'obscene, lewd, or lascivious'. Thus, the Court emptied the amendment of all meaning. We think that it is a more natural reading of the clause to hold that by the amendment, Congress added a new class of unmailable matter,—the filthy . . .'"

It is thus clear that the Court has sharply differentiated between language that is obscene, lewd or lascivious

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and language which is filthy. *Hence, an indictment charging the depositing of an obscene, lewd or lascivious letter cannot be sustained by proof of a letter that may be filthy but not obscene, lewd or lascivious.*

The test whether a letter is obscene, lewd or lascivious is: does the language used have a tendency to deprave and corrupt the morals of those whose minds are open to such influences by arousing and implanting therein obscene, lewd or lascivious desires and by inducing sexual immorality? *Swearingen v. U. S., supra; Dysart v. U. S.*, 272 U. S. 655, 71 L. ed. 461, 47 S. Ct. 234; Judge Bok's opinion in *Commonwealth v. Gordon, et al.*, 66 D. & C. 101 (Pennsylvania).

In the instant case there is nothing in the letter that would incite or excite sexual desires or passions in the wife-addressee nor was that the intent of the writer. This letter may be abusive, insulting and one that would arouse the indignation, anger and resentment of the recipient, but not sexual passions or desires. Quite the contrary. The reading of this letter instead of debasing the morals of the decent, correct and moral minded would have the very opposite effect. The letter is a bitter, perhaps indelicate, complaint by a husband to his wife. *But two words do not make a letter of over one hundred words obscene, lewd or lascivious.* See *Walker v. Popenoe*, 149 F. 2d 511 (App. D. C.): "The statute does not bar from the mails an obscene phrase or sentence." (And even the Solicitor General must concede that there are only two questionable words in this letter!) It cannot be that the writer of a letter containing two monosyllabic words to his wife and never meant to be an obscene *publication* is to be condemned as a criminal, while authors of hundreds of books that freely circulate in this country and contain the very same words or expressions

are immune from prosecution because the writings are considered literature. The Act makes no distinction between literary and non-literary publications. It is the courts that have construed the statute so as not to apply to writings *even though they contain the very words used in this letter,* if the primary purpose of the writer is not to deprave and corrupt the morals by arousing and implanting obscene, lewd or lascivious thoughts and desires.

In determining whether a writing is obscene, it is imperative to consider the sender-addressee relationship. The same writing mailed to one addressee could correctly be considered obscene; yet if mailed to a different person, it could not. *U. S. v. Dennett,* 39 F. 2d 564 (C. C. A. 2); *U. S. v. Levine,* 83 F. 2d 156, 158 (C. C. A. 2); *cf. U. S. v. One Book entitled Ulysses,* 72 F. 2d 705, 708 (C. C. A. 2).

In *U. S. v. Wroblenski,* 118 Fed. 495, (D. C. Wis.) it was held that the mailing of a private, sealed letter by a son to his mother charging her with adulterous intercourse with a son-in-law, did not constitute the mailing of a letter containing "obscene, lewd and lascivious" language. The court therein stated "It is atrocious in spirit, and indecedent in the plain implication of the language. . . . The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. *So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee and no such tendency can be imputed to this letter to the mother of the defendant.*" (Emphasis supplied.)

In *Dunlop v. U. S.,* 165 U. S. 486, 500, 501, 17 S. Ct. 380, 41 L. ed. 799, this Court stated . . . "whereas the

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true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sexual desires and lascivious thoughts."

In *U. S. v. Barlow*, 56 F. Supp. 795 (D. C. Utah), appeal dismissed, 323 U. S. 805, 65 S. Ct. 25, 89 L. ed. 642, the court stated: "In conclusion, it might be said that the natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts. We must also bear in mind that one cannot pick up a national magazine, or go to the theatre or movie without being confronted with illustrations and advertisements that tend more to incite sexual desire than do any of the publications in this magazine that have been called to our attention. In fact, sexual excitement is a selling point of innumerable publications and advertisements that pass without comment or prosecution."

It is clear that obscenity is measured by erotic allurement. The matter must suggest impure or libidinous thoughts and invite to lewd and lascivious practices and conduct, must create a desire for gratification of animal passions, must encourage unlawful indulgence of lust, or attempt to satisfy the morbid appetite of the salacious.

Measured by these criteria, it must be held that appellant's letter to his wife is not obscene, lewd or lascivious.

The Solicitor General in his brief (p. 5) opposing the petition for certiorari stated: "Assuming *arguendo*, then, that the letter was not obscene, lewd or lascivious, but merely filthy, the omission of the latter word from the indictment in characterizing the letter was harmless and should be disregarded." But a conviction cannot be sustained merely because the petitioner could have been differently indicted.

Whether the letter is "filthy," is of no consequence in determining petitioner's guilt. He was never indicted for mailing a "filthy" letter; he was never tried for mailing a "filthy" letter; he was never convicted of mailing a "filthy" letter. The record shows that the Trial Judge found petitioner guilty "of the offense of depositing in the United States mails *obscene* letters as charged" (R. 17). Clearly, petitioner's conviction cannot now be upheld upon the ground that the letter in question was "filthy." An affirmance of his conviction upon that ground would be a clear violation of due process. *Cole v. Arkansas,* 333 U. S. 196, 201.

The failure of the indictment to charge the defendant with mailing a "filthy" letter is not a "mere technicality." *Cf. Sutton v. U. S.,* 157 F. 2d 661 (C. A. 5); "A man shall not be charged with one crime and convicted of another." Marshall, C. J. in *The Hoppet v. U. S.,* 7 Cranch 389, 393.

III.

Application of the Statute to This Letter Between Husband and Wife Is an Invasion of Petitioner's Right of Freedom of Speech Guaranteed by the First Amendment.

The statute as construed in this case makes it a criminal offense to communicate by mail to one's wife and punishes the petitioner although what he has communicated is not claimed or shown to have been done with an evil or sinister purpose. There is nothing dangerous in the sending of such a sealed letter by a husband to his wife which can or should be forbidden by the State. The policy of the law has always been to *protect* confidential communications between spouses. Certainly, there is no showing of a clear and present danger to our government or its institutions which could justify such censorship of the mails with the

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imposition of criminal sanctions. *Taylor v. State of Mississippi, et al.*, 319 U. S. 583, 63 S. Ct. 1200.

Justice Holmes dissenting in *Leach v. Carlile*, 258 U. S. 138, 140, 42 S. Ct. 227, 228, 229, 66 L. ed. 511, stated: ". . . and notwithstanding all modern inventions letters still are the principal means of speech with those who are not before our face. I do not suppose that anyone would say that the freedom of written speech is less protected by the First Amendment than the freedom of spoken words. . . . The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the post office. If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so . . . But when habit and law combine to exclude every other it seems to me that the First Amendment in terms forbids such control of the post as was exercised here. I think it abridged freedom of speech on the part of the sender of the letters and that the appellant had such an interest in the exercise of their right that he could avail himself of it in this case."

See Justice Frankfurter concurring in *Hanegan v. Esquire*, 327 U. S. 146, 66 S. Ct. 456, who cited with approval the dissent of Justice Holmes in *Leach v. Carlile*, 258 U. S. 138, 140, 42 S. Ct. 227, 228, 229, 66 L. ed. 511, as "to the extent to which the First Amendment forbids control of the post so far as sealed letters are concerned . . ."

Petitioner submits that the First Amendment forbids control of the post so far as this sealed letter from a husband to his wife is concerned. There is here no clear and present danger either to the morals of the public or to the

institutions of the Government. There is here no *publication*. The relationship of husband and wife negatives that concept which is indispensable to the application of this criminal statute.

Any attempt to restrict petitioner's liberties as guaranteed by the First Amendment "must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger." *Thomas v. Collins*, 323 U. S. 516, 528, 65 S. Ct. 315, 322. No such clear public interest justifies the invasion of petitioner's freedom of speech and right of privacy by the application of criminal sanctions against him. *U. S. v. C. I. O.*, 335 U. S. 106, 68 S. Ct. 1349; *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625; *Winters v. N. Y.*, 333 U. S. 507, 68 S. Ct. 665; *Cafeteria Employees Union, Local 302, et al. Angelos, et al.*, 320 U. S. 293, 64 S. Ct. 126.

CONCLUSION.

If the conviction is permitted to stand it will mean that no husband who believes his wife has committed sexual misconduct with other men could write to her in *non-legal terms* without subjecting himself to federal criminal prosecution for mailing an *obscene* letter. To sustain this conviction would overturn in a most dangerous way a long standing rule of privilege. But for this privilege, the very Government officials who in the course of their business mail documents (exhibits, etc.) in obscenity statute prosecutions would be subject to the same severe criminal penalties as petitioner. Significantly, *not one appellate decision can be found to support this result.* The very lack of au-

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thority for prosecuting a spouse[1] who mails a confidential letter to the other spouse under these circumstances indicates that those responsible for the administration of federal criminal justice have hitherto rejected such prosecutions. To uphold this conviction will open the door of the federal courts to a multitude of cases essentially involving domestic disputes; and there is no suggestion that state courts are incapable of coping with that problem.

It is respectfully submitted that for the reasons herein advanced petitioner's conviction should be reversed.

Respectfully submitted,

DAVID BERGER,
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[1] Compare the following District Court decisions: *U. S. v. Wroblenski*, 118 Fed. 495 (letter from son to mother); *U. S. v. Musgrave*, 160 Fed. 700 (letter from husband to wife); *U. S. v. Reinheimer*, 233 Fed. 545 (letter from sender to himself).